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In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 160–166) is reported at 243 F. 2d 427. The opinion of the District Court (R. 152–155) is reported at 141 F. Supp. 860.

JURISDICTION

The judgment of the court below (R. 166) was entered on April 2, 1957. The petition for a writ of certiorari was filed on June 28, 1957, and granted on October 14, 1957. The jurisdiction of this Court rests on 28 U. S. C. 1254.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in Appendix A, *infra*, pp. 55–61.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, provides in relevant part that the "Board, or any member thereof," shall upon application of any party to a proceeding "forthwith issue to such party" subpenas requiring testimony or the production of evidence. The section further provides that, within five days after the service of a subpena on any person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." The Board, by administrative regulation, has provided that applications to revoke subpenas which are returnable at a hearing shall be filed with, and ruled on in the first instance, by the trial examiner (in an unfair labor practice case) and the hearing officer (in a representation case). The rulings of the trial examiner or hearing officer are in turn subject to direct review by the Board itself, should the party take a "special appeal" to the Board.

The questions presented are:

1. Whether the Board's regulation is valid under the Act, so that the petitions to revoke the subpenas *duces tecum* which respondents had filed directly with the Board were properly referred by it to the hearing officer for his initial ruling.

2. Assuming an affirmative answer to the first question, whether respondents have standing to resist a Board suit to enforce the subpenas where, after the hearing officer denied their petitions to revoke, they failed to exhaust their administrative remedy of a special appeal to the Board from his ruling.

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING

In November 1955, Local 1625, Retail Clerks International Association, AFL–CIO, filed a petition pursuant to Section 9 (c) of the Act with the Board's Regional Office. The petition sought a representation election among the employees of a retail jewelry store in Miami, Florida (R. 13–18). At the hearing held on the petition, the employer filed a motion to dismiss the proceeding on the ground that his interstate operations did not meet the Board's administrative standards for the assertion of jurisdiction. He refused, however, to testify or furnish information on this issue, whereupon the hearing was adjourned for the purpose of permitting subpenas to be issued to secure the relevant data and testimony. Five subpenas *duces tecum* and one subpena *ad testificandum* were then issued. In accordance with the Board's regulations

and practice, they were issued by the Regional Director upon application of the Board attorney assigned to the case, and contained the facsimile signature of a Board member, here Member Murdock (R. 29–35, 36–38, 62–66, 85–89, 109–113, 136–138, 139–140).

The subpenas *duces tecum* were directed to the store where the petitioning union was claiming representation rights, to three other jewelry stores allegedly part of the same intrastate chain, and to Oliver A. Jenkins, the president of these stores, each of which is a separate corporation.[1] The subpenas to the stores required each to produce, before a hearing officer at a scheduled hearing on the representation petition, books and records showing: (1) total purchases for the year 1955; (2) purchases and sales for or on behalf of other stores in the chain during this period; and (3) the store's shareholders of record and the amount of shares issued to each (R. 36–38, 62–66, 85–89, 109–113). The subpenas further provided that, in lieu of the books and records, each store could produce a written statement of a responsible official summarizing the information which would be shown by the records (*ibid.*).

[1] Under its applicable jurisdictional standards, the Board will assert jurisdiction over a company operating a single retail store with no interstate sales only if its direct purchases from out-of-state are at least $1,000,000 annually, or its indirect out-of-state purchases are at least $2,000,000 annually. However, even if the store does not itself satisfy these requirements, jurisdiction will nevertheless be asserted over it if it is part of an intrastate chain, and the total direct or indirect inflow of all stores in the chain satisfy the aforementioned criteria. *Hogue and Knott Supermarkets*, 110 N. L. R. B. 543, 544. See also, *T. H. Rodgers Lumber Co.*, 117 N. L. R. B. 1732.

The subpenas *duces tecum* to Oliver A. Jenkins (R. 136–138) required that he produce before the hearing officer books and records showing his stock ownership in the various stores in the alleged chain, or, in lieu of the books and records, a certified statement setting forth this information. In addition, a subpena *ad testificandum* was directed to Jenkins, requiring him to appear at the representation hearing and give testimony (R. 139–140).

The stores and Jenkins, the respondents herein, filed motions to revoke the subpenas *duces tecum*, both with the Board and with the hearing officer, alleging, *inter alia*, that they were burdensome and had not been properly issued (R. 39–41, 67–69, 90–92, 114–117, 141–142). Jenkins also filed a petition to revoke the subpena *ad testificandum* (R. 131, 146). The Board refused to entertain the petitions to revoke filed with it, referring respondents to the provisions in its Rules and Regulations (*infra*, pp. 16–17) which require an initial ruling on such petitions by the hearing officer (R. 161–162). The hearing officer, in accordance with the Board's regulations, proceeded to consider the petitions to revoke. He granted respondents' request for leave to file briefs and to argue orally,[2] and thereafter denied the petitions for the reason that they raised "no substantial issue as to the validity of said subpenas" (R. 43–46).

In denying the petitions to revoke, the hearing officer offered to change the place of hearing from Miami

[2] Respondents, however, chose not to avail themselves of either opportunity (R. 45–46).

to Jacksonville, the main office of the stores, if the respondents preferred to comply with the subpenas in the latter city (R. 45–46). Respondents did not request such transfer, nor did they attempt to appeal the hearing officer's ruling on their petitions to revoke to the Board, under Sec. 102.57 (c) of the Board's Rules (*infra*, p. 18). Instead, when the hearing was reconvened for the purpose of adducing the evidence sought by the subpenas, respondents appeared through counsel and refused to comply with the subpenas (R. 11, 49). Pursuant to Section 11 (2) of the Act, the Board then instituted the instant proceedings against each respondent in the District Court for enforcement of the subpenas (R. 6, 55, 78, 101, 126).

B. THE COURT PROCEEDINGS FOR ENFORCEMENT OF THE SUBPENAS

Following hearing, the District Court quashed all of the subpenas (R. 152–155). The Court found that the subpenas *duces tecum* were unreasonable and oppressive. It further found that all of the subpenas were invalidly issued because they were not issued "upon application of any party to [the] proceedings," as required by Section 11 (1) of the Act, the court holding that the Board's Regional Director was not a "party" to the representation proceeding (*ibid.*).

On appeal, the court below sustained the District Court's refusal to enforce the subpenas *duces tecum*, but held that it should have enforced the subpena *ad testificandum*. In the view of the court below, "the matter of the enforcement of the subpenas [*duces*

tecum]" is not ripe for consideration," because the Board itself had not ruled upon the petitions to revoke. Noting that Section 11 (1) of the Act mentioned only the Board in providing for rulings on petitions to revoke, and relying on this Court's decision in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, holding that the Wage and Hour Administrator lacked power to delegate his subpena power to subordinates, the court below concluded that Congress intended to require the Board alone to rule on petitions to revoke subpenas *duces tecum* in representation cases. Accordingly, in the view of the court below, the Board's Rules which provide for initial rulings by hearing officers upon petitions to revoke subpenas, subject to the right of "special appeal" to the Board, were an attempt to make an unauthorized delegation, and the denial by the hearing officer of the petitions to revoke was thus a nullity. (R. 162–164.)

With respect to the subpena *ad testificandum*, the court below held that the failure of the Board itself to rule on the petition to revoke did not render proceedings to enforce that subpena premature, for "there appears no provision in the Act for a petition to revoke [such subpenas]" (R. 162). Concluding further that the subpena was issued on application of a "party," the Regional Director, the court below reversed the District Court in this respect (R. 166).[3]

[3] Review has not been sought of the judgment of the court below respecting the subpena *ad testificandum;* accordingly, no question as to that phase of the case is before this Court.

SUMMARY OF ARGUMENT

I

The Board's procedure for handling petitions to revoke subpenas is valid under the Act.

A. Section 11 (1) of the Act requires the Board to issue a subpena on request, but provides that the party subpenaed may petition the Board to, and the Board shall, revoke the subpena if it appears to be improper. By its Rules implementing Section 11 (1), the Board has provided that after the hearing has opened in a representation case, as here, petitions to revoke subpenas must be filed with the hearing officer and will be determined by him in the first instance. Provision is made, however, for the party aggrieved by a hearing officer's ruling to seek leave of the Board to take an immediate interlocutory appeal from his ruling. When a request for leave to appeal is filed, the Board reviews the hearing officer's initial decision. If the Board concludes that the request does not present a substantial question, it denies the request. On the other hand, where the underlying question is novel or substantial, and an immediate decision is warranted in order to avoid irreparable harm, the Board either grants the request, or, if no further showing need be made, reverses or modifies forthwith the hearing officer's ruling. Moreover, even where the request for permission to appeal is denied, any party aggrieved thereby is entitled to present the matter to the Board when the full case comes before it in the ordinary course.

B. Contrary to the view of the court below, the foregoing procedure does not involve a delegation to the hearing officer of the Board's decisional authority in respect to subpenas. Accordingly, no question is really presented as to the Board's authority under the Act to make such a delegation.

The essence of a delegation of authority is the tranmission of the power of final judgment from the party in whom it originally has been vested to a subordinate. The Board, however, has retained ultimate decisional control in subpena matters, and utilizes subordinate officials only to make preliminary rulings. The Board's decisions on review, moreover, are not *pro forma*, but as the cases show, involve a full and original consideration of the issues. Hence, the Board's procedure for handling petitions to revoke subpenas satisfies Section 11 (1) of the Act even if that provision be literally interpreted so as to forbid delegation by the Board of authority to determine the propriety of subpenas.

C. If, however, the Board's procedure for determining the validity of subpenas were to be viewed as a delegation of decisional authority to hearing officers, such a delegation is fully authorized by the Act. This conclusion is supported by all the relevant considerations stated by this Court in the two leading cases relating to the delegation of subpena powers by an administrative agency, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111.

1. Sections 4 (a), 5 and 9 (c) of the Act explicitly empower the Board to delegate to subordinate officials

the authority to investigate and conduct hearings in representation cases. The handling of subpena questions is "a necessary incident to the power to investigate," and thus may reasonably be implied to be delegable to the same officials whom the Board designates to conduct such investigations and hearings. *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7). Indeed, because the efficient investigation and hearing of a representation case depends upon the subpena power, authority of the Board to delegate this power should be no less than it is in other situations throughout the Act, where, although functions are explicitly vested in the Board alone, it is unquestioned that these functions could only be exercised through subordinates. Authority to delegate subpena powers is controlled by the principle that the specification of statutory purposes confers upon the administering body the implied authority to fashion "the necessary means to accomplish those objects." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 259.

2. In the *Mohawk* case, *supra*, this Court supported its holding that the Emergency Price Control Act impliedly authorized the delegation of subpena powers on the ground, *inter alia*, that the statute contained a broad rule-making power. Section 6 of the National Labor Relations Act grants an equally broad rule-making power to the Board. Accordingly, this is an additional source of authority for the Board's requirement that initial rulings on subpena questions be made by the hearing official.

3. The magnitude of the Board's case load and the large number of subpenas which are regularly issued in connection therewith plainly show that it is not feasible administratively to require direct Board rulings in the first instance as to the propriety of all challenged subpenas. Moreover, to require such Board rulings would inevitably delay final decision in representation cases, a result contrary to the expressed wishes of Congress. Here, as in the *Mohawk* case, *supra*, the statute should not be construed to render it unworkable.

4. When Congress amended Section 11 (1) of the Act in 1947 it indicated that it wished to alter the existing Board practice respecting subpenas in only one respect—*i. e.*, to defer the determination of the propriety of a subpena from the issuance stage to a subsequent, petition to revoke, stage. Since a determination of the subpena's propriety was made by hearing officers in the first instance under the Wagner Act, pursuant to Board Rules paralleling those under the amended Act, it follows that Congress contemplated that the same practice was to be continued at the petition to revoke stage of the proceeding. This conclusion is strengthened by the fact that the Board's practice under the Wagner Act was well known to Congress when the 1947 amendments were passed. The Congressional desire to continue that practice negatives any adverse inference that might otherwise be drawn from the unexplained elimination by the Senate and House conferees of provisions in the House bill which explicitly granted subpena powers to the Board or its agents.

II

The failure of respondents to exhaust their administrative remedy of a special appeal to the Board, pursuant to regulations shown to be valid, requires summary enforcement of the subpenas.

The Board's Rules respecting subpenas, which are shown to be valid, provided respondents an opportunity, through the special appeal procedure, to obtain Board review of the hearing officer's rejection of their contentions that the subpenas were improper. By failing to avail themselves of this procedure, respondents did not exhaust their administrative remedy before submitting their position to the District Court. Under settled doctrine, respondents were thus barred from asserting their defenses in the enforcement suit, and the District Court should have enforced the subpenas forthwith.

ARGUMENT

INTRODUCTION

The subpenas *duces tecum* which respondents have refused to obey were directed to the production of evidence relating to the question whether the employer's operations had sufficient impact on interstate commerce to warrant assertion of jurisdiction by the Board under its self-imposed jurisdictional limitations. See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 3–4; n. 1, p. 4, *supra*. The propriety of inquiring into this matter in an investigation of a petition under Section 9 of the Act, as well as the necessity of doing so by subpena where, as here, the employer refuses

to furnish the underlying information voluntarily, cannot be gainsaid. Nor is it questioned that the procedure followed in issuing the subpenas, and in determining their validity when petitions to revoke were filed, was in full conformity with the Board's Rules and Regulations. The critical question in this case is whether the procedure itself is authorized by the Act insofar as it provides for the hearing officer in a representation case, upon the filing of petitions to revoke subpenas, to make the initial ruling as to the validity of the subpenas.

The conclusion of the court below that the vesting of this function in the hearing officer constitutes a delegation of power unauthorized by the Act is contrary to the views of two other Courts of Appeals,[4]

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[4] *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160 (C. A. 7); *National Labor Relations Board* v. *Lewis*, 41 LRRM 2078 (C. A. 9), decided October 29, 1937. Although, as the court below noted (R. 163), the statement in *Barnes* with respect to petitions to revoke was dictum because only the validity of *issuance* of the subpena was challenged in that case, the Seventh Circuit subsequently affirmed its views upholding the Board's procedure as to petitions to revoke in a case where that question was directly presented. *National Labor Relations Board, ex rel. Kohler Co.* v. *Gunaca*, 135 F. Supp. 790, 793–795 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), order granting certiorari vacated, 353 U. S. 902. Nor is the relevance of *Gunaca* and *Lewis* diminished by the fact that they involved a trial examiner in an unfair labor practice, who, unlike the hearing officers presiding at representation hearings (the situation here), are subject to, and appointed in conformity with, the requirements of the Administrative Procedure Act (5 U. S. C. 1004 (c), 1006, 1010). Although Section 7. (b) of that Act (5 U. S. C. § 1006 (b)) provides an independent source of authority for trial examiners, the Ninth Circuit in *Lewis* relied exclusively, and the Court in

and would upset an administrative interpretation of the Act which has been followed continuously since the Act was amended in 1947, and, indeed, was followed under the Wagner Act as well (*infra*, pp. 41–43). In Point I below, we shall show that the Board's procedure is in fact consistent with the statute. More specifically, we shall show (1) the nature of the statutory authority respecting subpenas and the manner in which the Board exercises this power; (2) that, properly understood, the Board's subpena procedures do not present a delegation problem at all, in that the Board itself retains the power of final decision in each case; and (3) that, even if there were a full delegation of Board authority to the hearing officer in respect to ruling on petitions to revoke subpenas, the Act would not preclude such delegation. We shall also show—in Point II below—that respondents, who did not invoke the special appeal provisions under the Board's rules after the denial of their petitions to revoke by the hearing officer, failed to exhaust their administrative remedies. Consideration in an enforcement proceeding of respondents' other defenses to the subpenas is, therefore, precluded and the Board is entitled to a summary enforcement order.

Gunaca relied primarily, on the scheme of the National Labor Relations Act itself in sustaining the Board's procedure in respect to petitions to revoke. Indeed, in its opinion in *Lewis*, the Ninth Circuit expressly disagreed with the decision of the court below (41 LRRM at 2080–2081). See also, *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.).

I

THE BOARD'S PROCEDURE FOR HANDLING PETITIONS TO REVOKE SUBPENAS IS VALID UNDER THE ACT

A. THE MANNER IN WHICH THE BOARD EXERCISES THE SUBPENA POWER CONFERRED ON IT BY THE ACT

The statutory procedure governing the issuance and revocation of subpenas is contained in Section 11 (1) of the Act, which in relevant part reads:

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10--
>
> (1) * * * The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required * * *.

The exercise of the Board's subpena power is thus divided into two steps. The first step, as to which no question is presented in this case, relates to the

grant of subpenas. This step is mandatory; the issuance of a subpena must be "forthwith" upon application. The second step, on petition to revoke, brings into play, for the first time, the power to rule upon the validity of the subpena already issued.

The Board has devised the following procedure for implementing the statutory provisions: (1) blank subpenas bearing the seal of the Board and the facsimile signature of a Board member are supplied to the Board's regional offices and trial examiners; (2) upon the application of a proper party, the Regional Director (if the request occurs prior to the hearing), or the hearing officer or trial examiner (if the request occurs at the hearing), automatically issues the subpena, which is filled out and served by the requesting party; (3) where, as here, the subpena is returnable at a hearing, the initial ruling on any petition to revoke the subpena is made by the hearing officer or trial examiner.[5] Thus, Section 102.58 (c) of the Board's Rules and Regulations, governing subpenas in representation cases, reads:

> Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not

[5] Trial examiners hear unfair labor practice cases, whereas hearing officers generally hear representation cases. See n. 4, p. 13, *supra*.

intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer. *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling * * *.

The authority of the hearing official to rule on petitions to revoke is not unqualified. The Board retains an overriding control by further providing that any party aggrieved by a hearing officer's ruling may, "by special permission of the Board," appeal that ruling directly to the Board for immediate Board re-

view thereof. This is reflected in Section 102.57 (e) of the Board's Rules, which states:

> All motions, rulings and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board *except by special permission of the Board,* but shall be considered by the Board when it reviews the entire record. *Requests to the Board for special permission to appeal* from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.[6] * * * [Emphasis added.]

In practice, this appeal procedure works as follows: Where a party aggrieved by a hearing officer's initial ruling wishes to take advantage of the special appeal procedure, he files a request for leave to appeal with the Board, stating the grounds relied on, and serves a copy thereof on the other parties to the proceeding. Upon receipt of this request, together with any responses filed by the other parties, the Board itself, in deciding whether to grant the appeal, will review the propriety of the hearing officer's ruling. If the Board concludes that no substantial question has been raised

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[6] The comparable provision for unfair labor practice cases is Section 102.26; pp. 59–60, *infra*.

concerning the validity of the initial ruling, it will deny the request for the special appeal.[7] On the other hand, should the Board conclude that the request raises a novel or substantial question and that an immediate decision is appropriate, it grants leave to appeal, or, if the request and the responses thereto adequately present the problem, it may forthwith reverse or otherwise modify the hearing officer's ruling on the petition to revoke the subpena.[8]

Moreover, even where no special appeal is taken or leave to appeal is denied, the Board still retains a reviewing power over the hearing officer's rulings on petitions to revoke. The Board receives the entire record of each case following the hearing, and any party aggrieved by a hearing officer's ruling on a petition to revoke a subpena is entitled to have included in the record his petition and that ruling. Section 102.58 (c) of the Board's Rules and Regulations (*supra*, pp. 16–17). Upon the transfer of the case to it, the Board fully considers and determines all questions which the parties have presented, including any subpena questions. Section 9 (c) of the Act; Sections 102.59 and 102.60, Board's Rules and Regu-

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[7] Board rulings on requests for special permission to appeal from rulings on petitions to revoke subpenas are not published. Several examples of Board orders denying such requests are reprinted *infra*, in Appendix B. As these show, the Board may, in appropriate cases, note that the denial of the request to appeal is without prejudice to the right to renew the issue when the record is thereafter presented to the Board for decision in the regular course of procedure (see *infra*, p. 65).

[8] Orders in four such cases are reprinted in Appendix B, *infra*, pp. 66–70, by way of example.

lations (pp. 56, 61, *infra*). Thus, the special appeal procedure enables the Board to review a subpena question in the situation where an immediate Board ruling is required in order to preserve the position of a party or prevent irreparable injury. Absent these conditions, the Board may defer its power of review until the entire case is transferred to it in normal course. For example, revocation of a subpena by the hearing officer ordinarily would not warrant interim Board review under the "special appeal" procedure. But, when the full case is before it, the Board will pass upon the revocation ruling, and, if it finds it to have been erroneous and that the evidence sought is essential to a decision of the issues, the Board will reverse the hearing officer's ruling and remand the case to him for introduction of the evidence called for in the subpena.[9]

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[9] Illustrative of cases where the Board, upon the regular transfer of the proceeding to it, has reviewed and rendered its decision on petitions to revoke previously ruled upon by a hearing officer, are *The Hertner Electric Co.*, 115 N. L. R. B. 820, 821–822; *Bell Aircraft Corp.* 98 N. L. R. B. 1277, 1282, n. 4; *International Furniture Co.*, 106 N. L. R. B. 127, 128, n. 2; *Jamestown Sterling Corp.*, 106 N. L. R. B. 466; *Burnup & Sims, Inc.*, 95 N. L. R. B. 1130, n. 1; *Morrison Turning Co., Inc.*, 83 N. L. R. B. 687. Furthermore, where the Board has already ruled on a petition to revoke in a special appeal, it will review its own ruling if the aggrieved party continues to press the matter, when the case comes to it on the full record. See, *New Britain Machine Co.*, 105 N. L. R. B. 646, n. 1; *The Midvale Co.*, 114 N. L. R. B. 372, 374. Note also *International Broadcasting Corp. (KWKH)*, 102 N. L. R. B. 1434, where, on its own motion, the Board undertook to determine and dispose of an outstanding subpena which had neither been complied with nor enforced.

B. SINCE THE BOARD RETAINS AN OVERRIDING DECISIONAL AUTHORITY IN EVERY CASE, THERE HAS BEEN NO TRUE DELEGATION OF THE BOARD'S POWER TO RULE ON PETITIONS TO REVOKE SUBPENAS

In the light of the foregoing description of the manner in which the Board exercises its subpena power, we submit that the court below erred in viewing the issue here to be "whether the Act empowers the Board to *delegate* to hearing officers the power to pass upon * * * petitions to revoke [subpenas]" (R. 162). (Emphasis added.) Since the Board has retained authority to review the hearing officer's rulings on petitions to revoke subpenas, there has not been a true delegation of the Board's power over petitions to revoke, but merely a deferment of its exercise until the Board has first obtained the benefit of an initial decision by the official conducting the hearing.[10]

The essence of a delegation of authority is the transmission of the power of final judgment from the person in whom it originally has been vested to a subordinate. See *Runkle* v. *United States*, 122 U. S. 543, 557.[11] But where, as here, ultimate control is re-

[10] If this view be accepted, it follows that *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, relied on by the court below, is inapposite. That case (discussed more fully, pp. 25, 26, n. 15, 30–32, *infra*) involved a true delegation in that the Wage and Hour Administrator, in authorizing regional directors to sign and issue subpenas *duces tecum*, reserved no power of review. See the Administrator's regulations, set forth in *Lowell Sun* v. *Fleming*, 120 F. 2d 213, 215, fn. 1 (C. A. 1), a companion case to *Cudahy*.

[11] See also, Davis, *Administrative Law* (West Pub. Co., 1951), p. 74; *Williams* v. *United States*, 1 How. 290, 296–297; *In re Triangle S. S. Co.*, 3 F. 2d 894, 896 (C. A. 2), certiorari denied, *sub nom. United States* v. *Maurice F. Davidson, Trustee, etc.*,

tained by the superior and the subordinate is utilized to consider preliminarily, or to give advice, there has been no improper delegation of functions which the statute requires the superior to perform. See *Eagles* v. *Samuels*, 329 U. S. 304, 315–316; *Southern Garment Manufacturers' Association* v. *Fleming*, 122 F. 2d 622, 626–627 (C. A. D. C.). Cf. *Morgan* v. *United States*, 298 U. S. 468, 481 (the law "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department").

The Board's procedure for handling petitions to revoke subpenas satisfies these criteria. As we have shown (pp. 17–20, *supra*), although all petitions to revoke subpenas returnable at a hearing must first be passed on by the hearing officer, full opportunity is afforded for a Board review of each ruling. To be sure, the majority of subpena questions are finally determined without any appeal to the Board, *i. e.*, without invoking the special appeal machinery or contesting the hearing officer's ruling following the transfer of the case to the Board. However, this is a consequence of the nature of the objections which are raised, and the fact that these objections, often dilatory in character, are frequently abandoned. Whenever a party is dissatisfied with the hearing officer's ruling, the machinery exists whereby he may obtain review by the Board itself. Moreover, such review is not *pro forma*, but involves a full and original consideration of the issues. Thus, the Board

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267 U. S. 597; *West Springfield* v. *Mayo*, 265 Mass. 41, 163 N. E. 653, 654; Grundstein, *Subdelegation of Administrative Authority*, 13 Geo. Wash. L. Rev. 144, 193–194.

does, in fact, reverse the hearing officers' rulings when such action is deemed appropriate.[12] And, even where hearing officers are upheld, the Board decision reflects its independent judgment.[13] Nor is the extent of the Board's control lessened by the circumstance that an immediate appeal from the hearing officer's ruling does not exist as of right, but requires the "special permission" of the Board. For, as pointed out pp. 18–19, *supra*, the Board, in determining whether or not to authorize the appeal, decides whether a substantial question has been raised concerning the validity of the hearing officer's ruling, and whether its resolution requires immediate Board intervention. Accordingly, even where permission to appeal is denied, there has been, at the very least, a judgment by the Board itself that the petition to revoke does not raise a problem warranting Board action at that stage of the proceedings.[14]

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[12] In addition to the cases referred to in notes 8 and 9, *supra*, see, *e. g.*, *International Furniture Co.*, 106 N. L. R. B. 127, 128, n. 2; *Coulter Jones & Son*, 89 N. L. R. B. 1146, n. 1; cf. *General Furniture Corp.*, 109 N. L. R. B. 479, 480, n. 2.

[13] In addition to the cases referred to in notes 7 and 9, *supra*, see, *e. g.*, *Meridian Plastics, Inc.*, 108 N. L. R. B. 203, 204; *Bill Heath, Inc.*, 89 N. L. R. B. 67, 68; compare *Tomlinson of High Point, Inc.*, 74 N. L. R. B. 681, 683–686.

[14] Moreover, since respondents did not request the Board for special permission to appeal from the hearing officer's ruling on their petitions to revoke (p. 6, *supra*), their contention that the Board's procedures are invalid cannot be determined upon the assumption that such appeal would have been denied. That is, it must be assumed, at least for purposes of this case, that the Board would have granted leave to appeal the hearing officer's ruling, if sought by respondents, and thus would necessarily have been required to consider fully and determine respondents'

In sum, if Section 11 (1) of the Act, in providing that "the Board shall revoke" subpenas, were deemed to require that the Board itself must exercise the ultimate decision on petitions to revoke, this occurs under the Board's procedure. The language of Section 11 (1) does not suggest that a Board determination of the issues raised by a petition to revoke a subpena need be made at any particular stage of a case, or that the Board may not benefit from the preliminary expression of views of a hearing officer. Cf. *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706–707. The Board's procedure goes no further. It utilizes the hearing officer, who is ordinarily in the best position to assess the relevance of the data sought, to make the initial ruling on a petition to revoke, and in this way most cases can proceed expeditiously and without interruption, a particularly important objective in representation proceedings (see pp. 37–38, *infra*). However, opportunity is afforded in every case for obtaining Board review should the parties desire, and the Board will, if the situation warrants it, modify the hearing officer's ruling. In these circumstances, the Board retains the power of ultimate judgment, and thus there has been no true delegation of the Board's authority over petitions to revoke subpenas.

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claim that the subpenas were improper. Cf. *Smith* v. *Cahoon*, 283 U. S. 553, 562; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *Utley* v. *St. Petersburg*, 292 U. S. 106, 110.

C. IN ANY EVENT, THE ACT AUTHORIZES THE BOARD TO DELEGATE THE POWER TO RULE ON PETITIONS TO REVOKE SUBPENAS TO HEARING OFFICERS IN REPRESENTATION CASES

If, however, the Board's procedure for determining the validity of the subpenas in this case is to be treated as a delegation of decisional authority to the hearing officer, as assumed by the court below but contrary to what we have shown in "B" *supra*, we nonetheless believe that the procedure is fully valid under the Act. The factors relevant in ascertaining whether the agency possesses authority to make such a delegation were analyzed by this Court in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111. Both *Cudahy* and *Mohawk* involved statutory provisions whose language explicitly conferred subpena power only upon the agency head. In *Cudahy*, the Court concluded that the Fair Labor Standards Act precluded the Administrator of the Wage and Hour Division of the Department of Labor from delegating his power to sign and issue subpenas. In *Mohawk*, however, where the relevant provisions of the Emergency Price Control Act were "practically identical" with those in the Fair Labor Standards Act (331 U. S. at 120), the power to delegate was found to be impliedly vested in the Price Administrator. Together, these cases establish, at the very least, that, contrary to the reasoning of the court below (R. 162), neither the absence of an express power to delegate subpena determinations nor the presence of unqualified language conferring subpena authority upon the

agency head, is necessarily controlling in deciding whether the authority to delegate exists. Rather, the answer to the question turns upon Congressional intent as ascertained from a consideration of the subpena provision in the light of the structure of the statute as a whole, the legislative history, and the function which the statute confers upon the agency.[15]

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[15] Certain portions of the opinions in *Cudahy* and *Mohawk* appear to suggest that the only question decided in those cases was whether the agency head could properly delegate the function of signing the subpena and that no consideration was given to whether he could also delegate the function of issuing the subpena. Thus, the opinion in *Cudahy*, after noting that the Wage and Hour Administrator had delegated both the power to sign and issue subpenas, pointed out that there were some agencies where "the actual issuance of subpenas, though not their signing, is delegated to subordinates * * *." The Court concluded that it was "*not concerned here with the validity of such a practice* * * *" (315 U. S. at 365, n. 8; emphasis added.) (The Monograph on the National Labor Relations Board prepared by the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess., Part 5, pp. 18–19, which the Court cited, indicates that the Board was one of the agencies which utilized this procedure. See also, p. 42, *infra*.)

Similarly, in *Mohawk*, a concern only with the signing question is suggested by the statement at the end of the opinion that: "To tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration" (331 U. S. at 123).

We do not believe, however, that these statements, read in the light of the opinions as a whole, warrant the conclusion that the Court, in discussing the problem of who shall sign the subpena, was considering only a ministerial function. The discretion involved in issuing a subpena may be exercised at the time the subpena is signed, or the signature may be affixed in advance, with the judgment respecting use of the subpena

Cf. *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078 (C. A. 9); *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7). Accordingly, we analyze be-

reserved for the time when one is requested. The opinions in *Cudahy* and *Mohawk*, taken as a whole, establish that the Court was ruling on the delegability of the agency head's full subpena power, including the power to decide the propriety of the subpena itself. Thus, in *Cudahy*, the Court described the question to be whether the agency head had authority to delegate his statutory power "to sign and issue" subpenas (315 U. S. at 358). Moreover, in supporting its conclusion that the subpena power under the Fair Labor Standards Act was non-delegable with the consideration that such power is "capable of oppressive use, especially when it may be indiscriminately delegated" (315 U. S. at 363), the Court seems clearly to be talking about the power to determine whether a subpena is proper, and not about ministerial acts incidental to its use. In addition, the terms of the delegation of the Administrator to his subordinates in *Cudahy* show that the function delegated was discretionary. See, Confidential Inspection Manual of the Wage and Hour Division, reprinted in Appendix C of the Government's brief in *Fleming* v. *Lowell Sun Co.* (companion case to *Cudahy*), No. 529, October Term, 1941, pp. 71, 73–75.

Similarly, in *Mohawk* the Court phrased the question presented as covering the delegability of the power "to sign and issue" subpenas (331 U. S. at 113). Moreover, the portion of the opinion quoted above need not be read as a restriction of the question decided to the delegability of the ministerial act of signing subpenas, but only as revealing the Court's apprehension that, to deny the Administrator the right to delegate his subpena powers *in full*, would, "in view of the magnitude of the task" involved in having him exercise his "personal discretion" in each case, necessarily force him to make only a token exercise of those powers by supplying subordinate officers with subpenas signed in blank (*Id.* at 122–123). Finally, the terms of the delegation of the Administrator to his subordinates made clear, as did the analogous delegation in *Cudahy*, that the exercise of discretionary judgment was involved. See O. P. A. Manual, Sec. 9: 2201.04 (c), quoted at p. 30, n. 21 in the Government's brief in the *Mohawk* case, Nos. 483, 512 and 583, October Term, 1946.

low these factors with reference to the National Labor Relations Act, and show that on balance they weigh decisively in favor of Board authority to delegate its power to rule on petitions to revoke subpenas.[16]

1. *The Board has statutory authority to designate agents to investigate and conduct hearings in representation cases*

The National Labor Relations Act explicitly empowers the Board to designate subordinate officials to investigate and conduct hearings in representation cases, the kind of proceeding in furtherance of which the subpenas in this case were issued. Thus Section 4 (a) in relevant part reads:

> The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.

Section 5 adds:

> The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may desig-

[16] Although no petition to revoke was involved in *Cudahy* and *Mohawk*, the determination made by the subordinate in those cases in passing upon the request for a subpena was analogous to ruling on petitions to revoke Board subpenas. That is, as shown (n. 15, *supra*), under the Fair Labor Standards and the Emergency Price Control Acts the ruling on an application for a subpena entailed the exercise of discretion; under the Labor Act, as amended, the subpena is issued automatically, with the discretion being transferred to a subsequent, petition to revoke, stage (see pp. 44–49, *infra*).

nate, prosecute any inquiry necessary to its functions in any part of the United States.

And, Section 9 (c) specifically provides that the hearing in a representation case "may be conducted by an officer or employee of the regional office."[17] These provisions clearly contemplate that the prosecution of "any inquiry necessary to [the Board's] functions"—here an investigation of a representation petition[18]—"may properly be performed by someone other than the Board members themselves," even where such functions are in terms conferred only on the Board. *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 887 (S. D. Ind.).

Section 3 (d) of the Act confirms this conclusion. That section makes a separate grant of powers to the General Counsel of the Board, including the power of "general supervision over * * * the officers and employees in the regional offices," and states further that the General Counsel "shall have such other duties

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[17] Section 9 (c) also prohibits the hearing officer from making "any recommendations with respect [to the hearing]." The purpose of this qualification was to eliminate the "comprehensive report and recommendation to the Board" which, under the Wagner Act, was made by the hearing officer in every representation case. S. Rep. No. 105, 80th Cong., 1st Sess., p. 25, reprinted in Vol. 1, Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948) p. 431[3] (hereafter referred to as "L. H."). Accordingly, this restriction does not preclude the hearing officer from making procedural rulings which are incidental and essential to his statutory duty of "presiding at the hearing." *Ibid.*

[18] As this Court has noted, a representation proceeding under the Act is "an 'investigation,' essentially informal, not adversary." *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706.

as the Board may prescribe * * *." Pursuant to this provision, and as contemplated by the terms of Sections 4 (a) and 5, the Board has specifically delegated to the office of the General Counsel authority "to receive and process * * * all petitions filed pursuant to section 9," and to handle "all phases of the investigation through the conclusion of the hearing," reserving to the Board only those "matters involving decisional action after such hearing * * *."[19] The practice under the foregoing provisions has uniformly been that the actual investigative work and the conduct of the hearings in representation cases has been carried on by regional office employees.

The authority thus vested in the Board to delegate investigatory powers furnishes "reason to believe that Congress intended that the Board should also be authorized to delegate" its subpena power. For, the handling of subpena questions is a "necessary incident to the power to investigate and prosecute." *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7).

The foregoing analysis is not impaired, we submit, by the fact that the Court in *Cudahy* declined to imply power to delegate from Section 4 (c) in the Fair Labor Standards Act which is the counterpart of Section 5 of the National Labor Relations Act, the Court viewing the former to be "no more than a definition of the geographical or territorial jurisdiction

[19] Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (Effective April 1, 1955), 20 Fed. Reg. 2175, April 6, 1955.

of the Administrator and his representatives" (315 U. S. at 360). The provision in *Cudahy* read (52 Stat. 1062, 29 U. S. C. 204 (c)):

> [4(c)] The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

In this context the Court read "his powers" to refer to the respective power of the Administrator or his representative otherwise conferred by the statute, and not to authorize the latter to exercise the former's power. Section 5 of the National Labor Relations Act, on the other hand, defines the geographical jurisdiction of the Board in a sentence separate from that which authorizes the Board to use agents to prosecute inquiries necessary to its functions, *supra*, pp. 28–29. Moreover, Section 4 (c) of the Fair Labor Standards Act could not be read as a grant of delegation authority without assuming, as the Court observed, that the Administrator's power of delegation was "without limitation," because the Section includes "any or all of his powers" without qualification. (315 U. S. at 361). Section 5 of the National Labor Relations Act, however, does not lend itself to such an unrestricted meaning. The sentence which allows the Board to designate agents pertains to prosecutory and investigatory functions, thereby excepting the Board's final adjudicative functions. In thus confining the authority to delegate, Section 5 of the National Labor Relations Act provides the very "legislative guide for determining which [functions] may and which may not be delegated," the absence of which led the Court in *Cudahy* to conclude that Section 4 (c) of the

Fair Labor Standards Act did not constitute a grant of authority to delegate.

Nor is the inference concerning delegability of the subpena power which we have drawn from Section 5 and the other provisions of the National Labor Relations Act described above affected by the further circumstance that Section 11 (1), like the comparable provisions in *Cudahy* (see n. 26, *infra*), appears to draw a distinction between the subpena power and the power to copy evidence, mentioning the Board alone in connection with the former and specifying the Board or its agents in connection with the latter. The court below thought that these "carefully worded * * * gradations in authority" ruled out any implied authority in the Board to delegate the subpena power (R. 162). But, reliance on this circumstance proves too much. An examination of the Act as a whole reveals that Congress has consistently used the term "Board" alone even though it is apparent that the function could only be exercised through subordinates. For example, Section 9 (c) (1) states with reference to representation petitions that "the Board shall investigate such petition." Section 9 (e) (1) provides that "the Board shall take a secret ballot of the employees" to determine whether the authority to make a union security agreement should be rescinded. In Section 10 (k) "the Board is empowered and directed to hear" jurisdictional disputes giving rise to allegations of Section 8 (b) (4) (D) allegations. Section 10 (j) states that "[t]he Board shall have power" to petition the federal district courts for temporary relief in unfair labor practice cases. And Section 11 (2) pro-

vides that a subpena enforcement proceeding may be instituted "upon application by the Board." In all these situations, the Board nevertheless exercises its statutory functions through subordinate officials, as, indeed, it must if it is to meet its statutory responsibilities (see *infra*, pp. 35–41), and we do not think that the Board's practice can seriously be questioned.[28] If the word "Board" alone does not have a limiting effect in these cases, there is no reason why it should have that effect in Section 11 (1).

In contrast to the Court of Appeals' overly literal reading of the section, which is also negated by the further considerations set forth pp. 34–50, *infra*, we believe a more accurate guide in determining Congressional intent respecting agency authority to delegate the subpena powers, no less than other powers, is the established principle that declaration of explicit statutory purposes carries with it, by necessary implication, authority in the administering body to fashion "the necessary means to accomplish those objects." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 259. See also *National Labor Relations Board* v. *John S. Barnes Corp.*, *supra*, p. 30; 3 Sutherland, *Statutory Construction* (3d ed., 1943) § 5402; *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–411. Under this principle, the delegation to regional officials of authority to handle all phases of representation cases through the hearing

[28] See *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159 (C. A. 7); *Penello* v. *International Union, etc.*, 88 F. Supp. 935, 937 (D. D. C.); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 886–889 (S. D. Ind.); *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 898–899 (S. D. N. Y.).

stage, which we have shown to be specifically allowed by the statute, also presupposes a delegation to these officials of power to determine the propriety of subpenas issued in such cases as an incidental and necessary part of the main function of conducting representation investigations.

2. *The procedures adopted are a valid exercise of the Board's rule-making power*

In addition, here as in *Mohawk*, the National Labor Relations Act confers broad rule-making power upon the Board. One of the factors which prompted the Court in *Mohawk* to imply authority to delegate was the existence in the Emergency Price Control Act of a provision which permitted the Administrator to "issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act" (331 U. S. at 121). Pointing out that the Fair Labor Standards Act "granted no broad rule-making power," the Court added (*ibid.*):

> Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.[21]
>
> * * *

The National Labor Relations Act contains a rule-making provision equally as broad as that in Emergency Price Control Act. Section 6 of the National Labor Relations Act reads:

> The Board shall have authority from time to time to make, amend, and rescind, in the man-

[21] See also, *Jay* v. *Boyd*, 351 U. S. 345, 351, n. 8.

ner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

And, as in the Emergency Price Control Act, there is no provision in the National Labor Relations Act "negativing the existence of * * * authority [to delegate subpena powers]" (331 U. S. at 121). On the contrary, all other relevant considerations suggest the appropriateness of utilizing this rule making power to provide for such a delegation. For reasons given *supra*, pp. 28–34, since the statute expressly permits the Board to designate subordinate officials to handle representation investigations, it would follow that an agency regulation granting to such officials subpena powers, which are incidental to conducting those investigations, is a proper use of authority to make "such rules * * * as may be necessary to carry out the provisions of [the] Act." And as we show *infra*, pp. 35–50, both considerations of practicality and the legislative history of the 1947 amendments to the Act confirm the propriety and reasonableness of this use of the rule making power. On this score, it is plain that the instant case is controlled by the decision in *Mohawk*, rather than that in *Cudahy*. See *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081 (C. A. 9).

3. *The power to permit subordinates to pass, in the first instance, on petitions to revoke subpenas is essential to an orderly and efficient exercise of the Board's functions*

Here, as in *Mohawk*, practical administrative considerations "reinforce the construction of the Act

which allows * * * authority to delegate * * * subpoena power" (331 U. S. at 123). During the fiscal year ending June 30, 1956, the Board closed 8,070 representation cases and 5,619 unfair labor practice cases, issuing formal decisions in 1,751 of the representation cases and 400 of the unfair labor practice cases.[22] During a comparable period, a total of 855 subpenas were issued in representation cases, of which 218 were subpenas *duces tecum,* and the number issued in unfair labor practice cases was approximately as large.[23] Under the present procedure, the Board is required to interrupt its main decisional process for a consideration of subpena questions in only a handful of cases, for, as we have noted *supra* at p. 22, the parties are generally satisfied with the rulings of hearing officials on petitions to revoke and thus do not undertake a "special appeal" to the Board. If, however, the Board were precluded from utilizing this procedure, every petition would have to go directly to the Board, without the benefit of any preliminary screening by the hearing official. This would absorb time which the Board, already having a substantial case backlog,[24] could more profit-

[22] Twenty-first Annual Report of the National Labor Relations Board (Gov't Print. Off., 1957), pp. 163, 165. The fiscal year ending June 30, 1956 is the most recent period for which published figures are available.

[23] The statistics as to subpena activity are compiled from the files and records maintained by the Regional Offices of the Board and by the Board's trial examiners.

[24] At the close of the fiscal year ending June 30, 1956, there was a backlog of 1,444 representation cases and 2,318 unfair labor practice cases pending before the Board. Twenty-first Annual Report, *op cit.*, p. 163. Cf. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11–12.

ably spend on other matters. As the Seventh Circuit pointed out in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160: If "the Board must then, as a Board, pass upon every petition for the revocation of any subpoena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act." See also, *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081; cf. Final Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), p. 21.

Moreover, hearings under the Act are conducted throughout the United States and its Territories. To require the Board to pass, in the first instance, on every petition to revoke would interrupt and delay the hearing before the hearing officer, for where, as is usually the case, the subpena pertains to the central issue in the proceedings, there would be no alternative but to adjourn the hearing for a period of at least several days to permit the preparation and submission of a petition to the Board in Washington, and obtain its ruling thereon. A delay of this nature is particularly serious in representation cases which constitute the bulk of the Board's caseload. As Congress has emphasized: "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees * * * the union, unless an election can promptly be held to determine the choice of repre-

sentation, runs the risk of impairment of strength by attrition and delay while the case is dragging on * * * or else is forced to call a strike to achieve recognition by its own economic power." [25]

The foregoing demonstrates, we believe, the error of the conclusion of the court below that deprivation of the use of subordinate officials in the discharge of the Board's subpena powers "should not * * * prove unduly burdensome to the Board" (R. 163). And the further suggestion of the court below that in any event the remedy for an unworkable procedure "lies with Congress, not with the courts" (*ibid.*), misconceives the practical consequences of its holding. We do not seek a judicial cure for a legislative deficiency, but merely invoke the traditional rule, relied upon by this Court in *Mohawk,* that a statute will not be construed to make it administratively unworkable if another construction is reasonably possible. See also, *United States* v. *Fisher;* 2 Cranch 358, 385.

Nor may the difficulties emanating from the holding below be alleviated, as the Fifth Circuit suggested (R. 163), by using, in lieu of subpenas, "the right to copy any evidence of any person being investigated," which power, under the express language of Section 11 (1) of the Act, may be exercised by the "Board, or its duly authorized agents or agencies" (p. 58, *infra*). As this Court stated in *Cudahy* vis-à-vis a provision of the Fair Labor Standards Act granting the right to copy evidence, in terms comparable to that of Section 11 (1) of the National Labor Rela-

[25] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7.

tions Act,[26] such right, as distinguished from the right to subpena, "is, in effect, a power of inspection at the employer's place of business *to be exercised only on his consent*" (315 U. S. at 364). (Emphasis added.) Since the Board generally, as in this case (*supra*, p. 3), utilizes subpenas only when the respondent has failed to make the required information available voluntarily, it is clear that the Board's power to copy evidence is not a satisfactory substitute for the subpena power.

Moreover even if employer consent were not a prerequisite to inspection, the National Labor Relations Act, like the Fair Labor Standards Act, does not appear to contain any grant of authority for enforcement of the provisions relating to inspection and the copying of evidence. See Section 11 (2) of the former Act, which provides only for enforcement of subpenas. Absent explicit statutory authority, it is

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[26] Section 11 (a) of the Fair Labor Standards Act (29 U. S. C. 211 (a)) provides in applicable part: "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

The relevant part of Section 11 (1) of the National Labor Relations Act reads: "The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. * * *"

doubtful whether the Board would have standing to invoke the aid of a federal court in making the inspection provisions of the Act effective against recalcitrant parties. *Knapp* v. *Lake Shore Railway Co.*, 197 U. S. 536; *Cudahy Packing Co.* v. *United States*, 15 F. 2d 133, 134 (C. A. 7); compare *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 304.

In conclusion, it should be noted that the recognition given consideration of practical administration in *Mohawk* is in full accordance with settled authority that a government officer or agency upon whom a statutory duty is conferred need not perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense * * * expected to perform. This cannot be * * * for the * * * reason that it is impracticable—nay, impossible." *Williams* v. *United States*, 1 How. 290, 297. See also, *Miller* v. *Mayor of New York*, 109 U. S. 385, 394; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 206; *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 333; *United States* v. *Vivian*, 224 F. 2d 53, 56 (C. A. 7), certiorari denied, 350 U. S. 953; *Papayianakis* v. *The Samos*, 186 F. 2d 257, 259–260 (C. A. 4), certiorari denied, 341 U. S. 921; *Plapao Laboratories, Inc.* v. *Farley*, 92 F. 2d 228, 229 (C. A. D. C.), certiorari denied, 302 U. S. 732; *Lloyd Royal Belge Societe Anonyme* v. *Elting*, 61 F. 2d 745 (C. A. 2), certiorari denied, 289 U. S. 730; *United States* v. *Bareno*, 50 F. Supp. 520, 527 (D. Md.). See also the authorities cited *supra*, p. 33. There is every reason for applying this principle here. Not only do cogent considera-

tions respecting the efficient administration of the Act support the implication of authority to delegate the subpena power, but the reservation by the Board of the right to review rulings made by subordinate officials affords a safeguard against the exercise of that power in a manner that does not conform to Board policy.[27]

4. *Legislative ratification of the Board interpretation*

To the extent that the legislative history of Section 11 (1) of the amended Act throws light on Congressional intent respecting the delegability of the Board's subpena power, it too indicates, as did the relevant history in *Mohawk* (331 U. S. at 120–121), that utilization of subordinate officials was contemplated.

Section 11 (1) of the Wagner Act defined the Board's subpena power in the following terms:

> Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its members, agent, or agency conducting the hearing or investigation. * * *

[27] For this reason there is no occasion here, as there was in *Cudahy*, to weigh against the implication of authority to delegate the subpena power the fact that this power is "capable of oppressive use, especially when it may be indiscriminately delegated * * *" (315 U. S. at 363). See also the opinion of the court below (R. 163). It is precisely to guard against any danger of misuse of the subpena power that the opportunity for Board review is made available. See pp. 22–23, *supra*.

Thus, it vested the decisional authority to rule on the validity of subpenas in the Board itself in terms no less equivocal than found in the amended Act. The single difference was that the exercise of that authority was keyed to the issuance of the subpena rather than to the filing of a petition to revoke.[28] Early in the administration of the Wagner Act, however, the Board provided in its Rules and Regulations that initial rulings as to the propriety of subpenas should be made by subordinate officials, including the hearing officer where, as here, the subpena was applied for after the hearing had opened.[29] Provision was also made for special appeals to be taken to the Board, just as in Section 102.57 (c) of the current Rules and Regulations, where a party

[28] The considerations which underlay a decision to issue or not issue a subpena under the Wagner Act are described in the Monograph on the Board of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., pp. 18–19. See also, *The Sorg Paper Co.*, 8 N. L. R. B. 657, 658, n. 1; *The Solvay Process Co.*, 47 N. L. R. B. 1113, 1115, n. 4; *Inland Container Corp.*, 66 N. L. R. B. 607, 609, n. 2.

[29] Article II, Sec. 21 and Article III, Sec. 4, Rules and Regulations, Series 2, effective July 14, 1939. Similar provisions were retained in each of the changes made in the Rules and Regulations under the Wagner Act. See Article II, Section 21 and Article III, Section 4, Rules and Regulations, Series 2, as amended, effective March 13, 1940; *Id.*, Series 2, as amended, effective April 22, 1941; *Id.*, Series 2, effective September 6, 1941; Article II, Section 21 and Article III, Section 5, Rules and Regulations, Series 2, as amended, effective October 28, 1942; *Id.*, Series 3, effective November 26, 1943; *Id.*, Series 3, as amended, effective July 12, 1944; Secs. 203.27 and 203.52 (c), Rules and Regulations, Series 4, effective September 11, 1944.

was aggrieved by a hearing officer's ruling.[30] Accordingly, for a period of many years under the Wagner Act the Board consistently and openly interpreted its subpena power to permit authorized subordinates to make initial rulings as to the propriety of subpenas, subject to Board review either upon special appeal, or upon transfer of the entire case to the Board in the ordinary course.[31]

As observed by the Seventh Circuit in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161, "Congress was fully aware of the construction the Board had placed on [Section 11 (1)] and the procedure the Board was following in issuing subpoenas" when the 1947 amendments were enacted. The Report of the Attorney General's Committee on

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[30] The most recent pre-amendment provision was contained in Section 203.51 (c) of the Rules and Regulations, Series 4, effective September 11, 1946. Similar provisions were included in Series 2 and 3, and the amendments thereto, of the Rules and Regulations.

[31] However, it may be noted that a Senate Committee Print stated of the subpena provision of S. 1958, which was subsequently enacted into law: "S. 1958 takes care to recite with great particularity who may issue subpenas * * *. As in the committee draft, the power to issue subpenas is limited to Board members." Memorandum of March 11, 1935, Comparing S. 1958 and S. 2926, Sen. Comm. Print, 74th Cong., 1st Sess., reprinted in Vol. I, Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949) p. 1367. Whatever bearing this statement may have on the correctness of the Board's interpretation of its subpena powers under the Wagner Act, it has no bearing on the issue here. For, as we show in the text, pp. 43–48, in 1947 Congress approved the Board's interpretation, irrespective of its correctness as an original matter, and continued it in effect under the present statute.

Administrative Procedure[32] and testimony of the Board's General Counsel in Congressional hearings,[33] as well as numerous decisions of the Courts of Appeals[34] and the Board,[35] all described the Board's practice in this respect with particularity. Moreover, in changing the structure of the Board's subpena power under the Wagner Act, Congress subjected the manner of its exercise to close scrutiny. The House proposed two substantive changes in the existing Board practice: (1) the elimination in unfair labor practice cases, but not in representation cases, of the use of subpenas prior to hearings, and (2) the requirement that subpenas be issued automatically upon application, with the right of a party upon whom a subpena *duces tecum* is served to file a petition to revoke.[36] Thus, Section

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[32] Final Report, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), pp. 159–160, 423. See also, the Monograph on the Board of the Attorney General's Committee, S. Doc. No. 10, 77th Cong., 1st Sess. (1941), pp. 18–19.

[33] Hearings on S. 674, 675 and 918, before Subcommittee of Senate Committee on the Judiciary, 77th Cong., 1st Sess. (April 2–29, 1941), p. 278.

[34] See, *e. g.*, *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 80 (C. A. 3); *National Labor Relations Board* v. *Acme-Evans Co.*, 130 F. 2d 477, 479 (C. A. 7), certiorari denied, 318 U. S. 772; *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 46 (C. A. 3); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757–758 (C. A. 2).

[35] See cases cited in n. 28, *supra;* see also, Fifth Annual Report of the Board (Gov't Print. Off., 1941), p. 11.

[36] The reasons for the second change are not particularized in the legislative history of the 1947 amendments to the Act. However, under the Wagner Act there had been criticism to the effect that private parties were issued subpenas in Board proceedings only upon a showing of relevancy of the evidence

11 (1) of the House bill read, in applicable part (H. R. 3020, 80th Cong., 1st Sess., pp. 44–45, Vol. 1, L. H. pp. 201–202):

> SEC. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under section 9—
>
> (1) The Board, or any member thereof, or any trial examiner shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or its duly authorized agent or agents to revoke, and the Board, or such agent or agents, shall revoke such subpena if in its, his, or their opinion, as

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sought to be adduced, whereas counsel for the Board were able to obtain subpenas without making such a showing. See *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9, 18–19 (C. A. 7). It was to meet this criticism, which had also been made of the practice of other agencies, that Section 6 (c) of the Administrative Procedure Act (60 Stat. 240, 5 U. S. C. 1005 (c)) was passed with a view toward assuring "private parties the same access to subpenas as that available to the representatives of agencies." S. Rep. No. 752, 79th Cong., 1st Sess., 20; H. Rep. No. 1980, 79th Cong., 2d Sess., 33; 92 Cong. Rec. 5652, all reported in S. Doc. No. 248, 79th Cong., 2d Sess. at 206, 265, 363. See also Attorney General's Manual on the Administrative Procedure Act, p. 67 (1947).

> the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpena does not describe with sufficient particularity the evidence whose production is required.

The Senate bill, on the other hand, carried over without change the Wagner Act language relating to subpenas.[37] As finally enacted, Section 11 (1) preserved only that part of the House bill which transformed the subpena procedure into a two-step operation; in other respects the Senate bill was followed. Thus, not only was the House bill language restricting the use of pre-hearing subpenas omitted, but also that which specifically referred to "trial examiner" and "duly authorized agent or agents" in connection with the issuance and revocation of subpenas. The House Conference Report gives the following explanation (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 58, Vol. 1, L. H. p. 562):

> The Senate amendment, in section 11, made no change in the provisions of existing law. The House bill, in section 11, made several changes in addition to those made necessary by the division of functions under the House bill between the Board on the one hand and the Administrator on the other. *First*, the subpena power in connection with investigations was limited to investigations under section 9. *Second*, it was required that upon application

[37] S. 1126, 80th Cong., 1st Sess., p. 35, Vol. 1, L. H. p. 133. See also, S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, Vol. 1, L. H. p. 433.

> of any party, subpenas be issued to him as a matter of course, and a procedure was established whereby a person subpenaed could move to quash the subpena if the evidence covered thereby did not relate to any matter under investigation or in question or if it did not describe with sufficient particularity the evidence whose production was required. * * *.
>
> The conference agreement *follows the provisions of existing law* and the Senate amendment with the addition thereto of provisions requiring the issuance of subpenas as a matter of course on the request of any party, as was provided in the House bill. [Emphasis added.]

In the only other significant Congressional commentary respecting the change made in Section 11 (1), Senator Taft also emphasized that the amendment was intended to alter existing law only insofar as it required automatic issuance of subpenas, and postponed rulings as to their validity to the filing of a petition to revoke. As stated by Senator Taft (93 Cong. Rec. 6445, Vol. 2, L. H. p. 1543):

> Section 11 authorizes the Board to conduct hearings and investigations and to subpena witnesses. This section was not changed in the Senate amendment and was modified by the conferees in *only one respect*. The Board is required upon application of any party to issue a subpena as a matter of course. A procedure is established whereby the person subpenaed may move to quash the subpena if the evidence requested thereby does not relate to any matter under investigation or does not describe with sufficient particularity the evidence required. [Emphasis added.]

The foregoing statements from the House Conference Report and Senator Taft's analysis both emphasize that, except for instituting a two-step procedure for handling subpenas, no change was intended in the law as administered by the Board under the Wagner Act. This fact, we submit, overrides the significance of the deletion by the conferees of the language of the House bill which expressly permitted agents of the Board to act with respect to requests for and petitions to revoke subpenas. In so contending, we are aware that Congressional deletion of proposals may reasonably give rise to an inference that such action represented a rejection of the intended effect of the proposed language. Cf. *Cudahy*, 315 U. S. at 362–363, n. 3. However, in the face of the important evidence, referred to above, of an intent to continue, except for one modification, the existing procedure, under which the authority proposed by the deleted language had been implied, no such inference is required here.

It may be, as the Ninth Circuit speculated in concluding that the rejection of the House bill language expressly permitting delegation by the Board of subpena powers was "not persuasive" of an intent to disallow such delegation, that the "revison was made because it was felt that the added language was superfluous." *National Labor Relations Board* v. *Lewis*, decided October 29, 1957, 41 LRRM 2078, 2081, n. 4. Or, perhaps the explanation lies in the fact that numerous other powers are given by the Act to the Board without express authority to delegate, although such delegation is necessary to make the Act workable

(*supra*, pp. 32–33), and that the conferees thought it unwise to specify a power of delegation respecting subpenas "lest the specification be taken as exhaustive." Judge Learned Hand, concurring in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C. A. 2), affirmed *sub nom. Gemsco, Inc.* v. *Walling*, 324 U. S. 244. Whatever the explanation, this much is clear: the Senate version of Section 11 (1), which was meant to make "no change * * * in existing law" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, Vol. 1, L. H. p. 433), was adopted except for the addition of only that part of the House bill language necessary to require automatic issuance of subpenas, and to postpone rulings as to their validity until a petition to revoke was filed. Significantly, at no stage of the legislative consideration of the 1947 amendments was there any criticism of the Board's practice of entrusting its agents to make initial rulings as to the validity of subpenas. We believe the most reasonable conclusion to be drawn from this legislative background, therefore, is that Congress approved the Board's interpretation of Section 11 (1) of the Wagner Act, and modified the Board's long standing practice only to the extent of changing the stage at which rulings were to be made, deferring such rulings from the issuance to the petition to revoke stage. As summarized by the Seventh Circuit (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161):

> * * * Congress was fully aware of the construction the Board had placed on this section and the procedure the Board was following in issuing subpoenas. If Congress had not agreed with the Board's construction and the pro-

> cedure being followed, the subpoena provisions could have been further amended to expressly prohibit the delegation of the subpoena power by the Board. Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when amending Section 11 (1), must be considered as legislative ratification of the Board's construction and procedure. * * *.

Cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 44; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365–366; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Brooks* v. *Dewar*, 313 U. S. 354, 361.

II

THE FAILURE OF RESPONDENTS TO EXHAUST THEIR ADMINISTRATIVE REMEDY OF A SPECIAL APPEAL TO THE BOARD, PURSUANT TO REGULATIONS SHOWN TO BE VALID, REQUIRES SUMMARY ENFORCEMENT OF THE SUBPENAS

In their answers to the enforcement proceedings in the District Court, respondents raised several defenses in addition to contending that the Board's hearing officer was not authorized to make the initial ruling on their petitions to revoke the subpenas in this case (R. 50–52, 73–76, 96–99, 121–124). With the exception of the latter contention, and the assertion that the subpenas were oppressive and burdensome, respondents' defenses either were not pressed in the court below or were rejected by it (R. 161, 164–166),[38]

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[38] The court below did not pass on respondents' "oppressive" contention, but noted in its opinion that "courts can usually remove the oppression or burden without quashing the entire

The Board itself, however, has not had occasion to consider whether there was any substance to respondents' various defenses, for as we have shown, no attempt was made to take an appeal to the Board from the hearing officer's denial of respondents' petitions to revoke the subpenas.

We have shown that the Board's Rules and Regulations are valid and proper under the Act in providing that subpena questions are, in the first instance, to be resolved by a hearing officer or other Board official, subject to Board review by special appeal where appropriate. Such an appeal in this case provided an avenue for a full Board determination of the merits of respondents' defenses in advance of judicial consideration of the same defenses in the subpena enforcement proceedings which ensued. *Supra*, pp. 18–20. In these circumstances, by failing to avail themselves of the special appeal provisions, respondents did not exhaust their administrative remedies before submitting their position to the District Court review. Under settled authority, by not seeking Board determination of their defenses, respondents were barred from asserting them in the enforcement suit. See,

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subpena" (R. 164, n. 8). Cf. *Winn & Lovett Grocery Co.* v. *National Labor Relations Board*, 213 F. 2d 785, where the same court rejected a similar contention on the ground that the subpena in that case, just as here (*supra*, p. 4), permitted the submission of a statement of the desired information in lieu of production of the necessary books and records. In connection with the subpena *ad testificandum*, the court below rejected respondents' contention that the Regional Director was not a "party" entitled to request the issuance of subpenas (R. 164–166).

e. g., Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U. S. 752, 767–768; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168.[39]

The requirement that respondents exhaust their administrative remedy before presenting their contentions to a court is not affected by that part of Section 10 (c) of the Administrative Procedure Act which provides that "agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application * * * (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."[40] Even putting aside the question of

[39] It is of no moment in applying the doctrine of exhaustion of administrative remedies that judicial review of agency action results from a suit by the agency rather than by the private party who failed to exhaust his remedy before the agency. *Reconstruction Finance Corporation* v. *Lightsey*, 185 F. 2d 167 (C. A. 4); cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499.

[40] The entire subsection reads as follows (60 Stat. 243, 5 U. S. C. 1009 (c):

> Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

whether the denial of a petition to revoke a subpena—a ruling made preliminary to any decision on the merits of the case—is "otherwise final" and therefore not within the express exception to the foregoing language,[41] we read this language as covering only "final agency action for which there is no other adequate remedy in any court" (n. 40, *supra*). The evident object of the last sentence of Section 10 (c) is to specify the circumstances under which agency action shall be considered final for purposes of qualifying for judicial review under Section 10 (c) where such review is otherwise not available. Cf. H. Rep. No. 1980, 79th Cong., 2d Sess., p. 42. Where, as here, there is express statutory provision for judicial review irrespective of whether the agency action is final in the conventional sense (Section 11 (2) of the National Labor Relations Act), Section 10 (c) would seem to serve no function. Here, the availability of court review is unquestioned, and there is no reason for not determining the stage of that review by the traditional rules of exhaustion of administrative remedies. The reading we thus give to Section 10 (c) of the Administrative Procedure Act is in full harmony with this Court's observation that this statute "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499–500.

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[41] Compare *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384–385 with *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–546.

In sum, respondents have failed to invoke the procedure which is specially designed to afford the Board opportunity to examine their contentions. Accordingly, there was no opportunity for Board review of the defenses which respondents made in court, a situation which it is the object of the exhaustion doctrine to avoid. Cf. *Levers* v. *Anderson*, 326 U. S. 219, 222. See cases cited *supra*, p. 52. Proper application of the doctrine in this case therefore requires that the case be remanded to the district court with directions to enforce the subpenas forthwith.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case remanded to the district court with directions to enforce the subpenas forthwith.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
DUANE BEESON,
Attorneys,
National Labor Relations Board.

DECEMBER 1957.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

NATIONAL LABOR RELATIONS BOARD

* * * * *

SEC. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) * * * The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. * * *

* * * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies

as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

REPRESENTATIVES AND ELECTIONS

* * * * *

SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(e) (1) [As amended, 65 Stat. 601, 29 U. S. C. 159 (e) (1)] Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take

a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. * * *

* * * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue

to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are as follows:

SUBPART B—PROCEDURE UNDER SECTION 10(A) TO (I) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 102.26. *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the rules and regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party

shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(b) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any

matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling.

* * * * * *

SEC. 102.57 * * *

* * * * *

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.58 (e). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record. Requests to the Board for special permission to appeal from such rulings of the regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * * *

SUBPART C—PROCEDURE UNDER SECTION 9 (C) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES

* * * * * *

SEC. 102.58 * * *

* * * * *

(c) Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing

officer if made at the hearing. Applications for subpenas may be made *ex parte*. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

* * * * * * *

SEC. 102.59 *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the regional director shall forward to the Board in Washington, D. C., the petition, notice

of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 102.60 *Proceedings before the Board; further hearings; briefs; Board direction of election; certification of results.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to direct a secret ballot of the employees or to make other disposition of the matter. * * *

APPENDIX B

United States of America

Before the National Labor Relations Board

AVIS FORD, INC.	Cases Nos. 7–RC–2487	
GIB BERGSTROM, INC.	7–RC–2488	
MIDWAY MOTORS, INC.	7–RC–2489	
RUSS DAWSON, INC.	7–RC–2490	
GILBERT MOTOR SALES, INC.	7–RC–2491	
HETTCHE MOTOR SALES CO.	7–RC–2492	Consolidated
HOLZBAUGH MOTOR SALES, INC.	7–RC–2493	
JOHNS BROTHERS, INC.	7–RC–2494	
HOWARD LARE, INC.	7–RC–2495	
AL LONG, INC.	7–RC–2496	
STUART WILSON, INC.	7–RC–2497	
BELLING-MCHUGH, INC.	7–RC–2513	
WALKER MOTORS, INC.	7–RC–2436	
GROVES BUICK, INC.	7–RC–2502	Consolidated
MCGUIRE MOTOR COMPANY	7–RC–2503	
FLOYD RICE SALES & SERVICE, INC.	7–RC–2562	

EMPLOYERS

and

LOCAL 376, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., PETITIONER

ORDER

The Board, upon consideration of the several petitions by the Employers in these cases appealing the Hearing Officer's denial of the Employer's petitions to revoke subpenas, orders that the appeals be, and they hereby are, denied because there has been no showing that the information sought to be elicited

by the subpenas is not relevant to the matter under investigation.

Dated, Washington, D. C., November 5, 1954.

By direction of the Board.

OGDEN W. FIELDS,
Associate Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 4–RC–2198

In the Matter of

MITTLEMAN, BERNSTEIN & CO., EMPLOYER

and

LOCAL NO. 228, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL, PETITIONER

ORDER DENYING APPEAL

On December 24, 1953, counsel for Local No. 228, International Ladies' Garment Workers' Union, AFL, Petitioner herein, filed an appeal from the ruling of the Hearing Officer revoking Subpoena Duces Tecum and requested the Board to reverse the Hearing Officer and reinstate said Subpoena Duces Tecum. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said appeal be, and it hereby is, denied.

Dated, Washington, D. C., December 29, 1953.

By direction of the Board:

OGDEN W. FIELDS,
Associate Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 1-CA-1085

In the Matter of

MOUNT HOPE FINISHING COMPANY, MOUNT HOPE FINISHING COMPANY, INC., JOSEPH K. MILLIKEN, FRANK L. DAYLOR AND ROBERT D. MILLIKEN

and

TEXTILE WORKERS UNION OF AMERICA, CIO

ORDER DENYING REQUESTS

Counsel for Mount Hope Finishing Company, Inc., one of the Respondents in the above-entitled matter, having requested special permission to appeal directly to the Board from the ruling of the Trial Examiner on a Motion and Petition to sever and continue the said proceeding against this Respondent to the Fifth Region, and to revoke subpenas *duces tecum* heretofore issued, having requested oral argument thereon, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the aforesaid Respondent's request for permission to appeal from the Trial Examiner's rulings, and its request for oral argument be, and they hereby are, denied.

Dated, Washington, D. C., June 6, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

Case No. 6–RC–694

SA-MOR QUALITY BRASS, INC., EMPLOYER

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 152, AFL, PETITIONER

Case No. 6–RC–695

STERLING FAUCET COMPANY, EMPLOYER

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 152, AFL, PETITIONER

ORDER DENYING APPEAL

Counsel for Sterling Faucet Company and Sa-Mor Quality Brass, Inc., Respondents herein, having requested special permission to appeal directly to the Board from the rulings of the Trial Examiner revoking the Subpoenas numbers A–54676, B–22180, and B–10299 previously issued by the said Trial Examiner, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondents' request for special permission to appeal from the Trial Examiner's rulings be, and it hereby is, denied. This denial however, is without prejudice to the right of the Respondents again to present the issue to the Board pursuant to provisions of the Rules and Regulations subsequent to issuance of an Intermediate Report by the Trial Examiner.

Dated, Washington, D. C., March 11, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Cases Nos. 10-CA-2692 and 10-CA-2781

TRADE WINDS COMPANY, INC.

and

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS

ORDER

Counsel for George H. McGee having requested special permission to appeal directly to the Board from a ruling of the Trial Examiner denying said McGee's motion to quash a subpena *duces tecum* served upon him by Respondent Trade Winds Company, Inc.; the Board having granted said McGee's special permission to appeal; and the Board having considered the matter upon said appeal,

IT IS HEREBY ORDERED that the ruling of the Trial Examiner denying said motion to quash be, and it hereby is, reversed, and said subpena hereby is revoked, on the ground that an insufficient showing has been made that the documents elicited by said subpena are material or relevant at this time. This order is without prejudice to a renewal of the application for such subpena at some subsequent stage of the hearing before the Trial Examiner upon an affirmative showing of the necessity therefor.

Dated, Washington, D. C., February 19, 1957.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 1-CA-1288

In the Matter of

NEW BRITAIN MACHINE COMPANY

and

LODGE 1021 INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

ORDER

Counsel for Connecticut State Board of Mediation and Arbitration having filed for special permission to appeal directly to the Board from certain rulings of the Trial Examiner, and a brief in support thereof, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the special permission to appeal be, and it hereby is, granted; and

IT IS FURTHER ORDERED that the ruling of the Trial Examiner denying the Connecticut State Board of Mediation and Arbitration's motion to quash the subpoena served upon that Board's Chairman, be, and it hereby is, reversed; and

IT IS FURTHER ORDERED that the said subpoena be, and it hereby is, *quashed*.

Dated, Washington, D. C., January 30, 1953.

By direction of the Board:

OGDEN W. FIELDS,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 5-CA-467

In the Matter of

DAVID GOETZ, D/B/A FEDERAL SILK MILLS

and

TEXTILE WORKERS UNION OF AMERICA, CIO

ORDER

Counsel for Maryland Employment Security Board having requested special permission to appeal directly to the Board from a ruling of the Trial Examiner denying a Petition to revoke the subpoena duces tecum requiring the appearance of Edward A. Smith, a Referee employed by the Employment Security Board of Maryland, to testify in the above-entitled proceeding and to produce a transcript of certain testimony, and the Board having duly considered the matter,

IT IS HEREBY ORDERED that the special permission to appeal be, and it hereby is, granted, and that such appeal be filed with the Board in Washington, D. C., on or before March 24, 1952, with affidavit of due service of copies upon the parties to this proceeding. The parties to this proceeding may file a reply thereto, which reply must be received by the Board in Washington, D. C., on or before April 4, 1952, and must be accompanied by an affidavit of due service of copies upon the parties to this proceeding.

Dated, Washington, D. C., March 13, 1952.

By the direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 5–SA–467

In the Matter of

DAVID GOETZ, D/B/A FEDERAL SILK MILLS

and

TEXTILE WORKERS UNION OF AMERICA, CIO

RULING ON APPEAL

The Board, pursuant to Section 102.26 of its Rules and Regulations, having heretofore granted permission to the Maryland Employment Security Board to appeal directly to it from a ruling of the Trial Examiner denying a Petition to revoke the *subpoena duces tecum* requiring the appearance of Edward A. Smith, a Referee employed by the said Maryland Board;

Now therefore, upon a consideration of the appeal filed on March 19, 1952, by the Maryland Employment Security Board, the Board is of the opinion that the appeal is merited and hereby grants the appeal to revoke the said *subpoena duces tecum,* and the ruling of the Trial Examiner of January 11, 1952, is hereby reversed.

Dated, Washington, D. C., April 22, 1952.

By direction of the Board:

LOUIS R. BECKER,
Executive Secretary.

United States of America

Before the National Labor Relations Board

Case No. 2-RC-1792

In the Matter of

PHELPS DODGE COPPER PRODUCTS CORPORATION,
EMPLOYER

and

LOCAL 441, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, C. I. O., PETITIONER

ORDER

The Phelps Dodge Copper Products Corporation and Mr. W. J. Palmer, of the Company, having requested special permission to appeal to the Board from a ruling of the Hearing Officer denying a petition to revoke subpoenas Numbers A-38861 and B-13383; opposition to the request having been filed by United Electrical, Radio and Machine Workers of America, and the Board having considered the matter,

IT IS HEREBY ORDERED that the request for leave to appeal be, and it hereby is, granted, and

IT IS FURTHER ORDERED that the ruling of the Hearing Officer be, and it hereby is, reversed, as it appears to the Board that the evidence whose production is required by the subpoenas is not relevant to the matter in question in this proceeding. Accordingly, the petition to revoke the subpoenas is granted.

Dated, Washington, D. C., February 16, 1950.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1987